Supreme Court, U.S.
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No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

JOHN T. TUCKNESS,

Petitioner,

v.

MARVIN T. RUNYON,
POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE

and

RICHARD ASHCRAFT, PRESIDENT
of STANDARD-HART PRINTING CO., INC

Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Tenth (10th) Circuit

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John T. Tuckness
Council of Record
1947 NW Lane
Topeka, Kansas 66608-1638
1-785-357-0832

84pp

I. QUESTIONS PRESENTED FOR REVIEW

WHETHER AND TO WHAT EXTENT the Fourteenth Amendment protects Attorney Pro Se from abuses of Due Process.

WHETHER AND TO WHAT EXTENT the First Amendment protects Federal Job applicants (disabled veterans) from retaliatory actions based on the content of their speech, i.e. political opinions expressed in private speech on matters of public concern.

WHETHER AND TO WHAT EXTENT the Fifth Amendment protects Federal job applicants (disabled veterans) from retaliatory actions based on their right to vote their conscience in legal elections, and circulate petitions to put issues before the public in lawful elections.

II. CORPORATE DISCLOSURE STATEMENT

The appellant is an individual Attorney Pro Se and is not connected in any way to a corporation.

III. TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED for REVIEW i

II. CORPORATE DISCLOSURE STATEMENT .. i

III. TABLE of CONTENTS ii

IV. TABLE of AUTHORITIES iii

STATUTES/RULES/PROVISIONS vi

V. CITATIONS of the OFFICIAL and

UNOFFICIAL REPORTS 2

VI. JURISDICTIONAL STATEMENT 2

VII. STATUTES INVOLVED 3

VIII. CONSTITUTIONAL PROVISIONS 6

IX. CONCISE STATEMENT of the CASE 6

X. SUMMARY of ARGUMENT 9

XI. ARGUMENT 11

XII. CONCLUSION 20

IV. TABLE OF AUTHORITIES

CASES **PAGES**

Anderson v. Liberty Lobby Inc., 477 U.S. 24 (June 25, 1986) 9, 15, 22
Board of County Commissioners, Wabaunsee County, Kansas v. Keen A. Umbehr, 518 U.S. 668, No. 94-1654 116 S.Ct2342, 135 L.Ed.2d 843 (June 28, 1996) 20
Bounds v. Smith, 430 U.S. 817, 823 (April 29, 1977) 15
Bruce R. Baird v. Roger F. Cutler, 883 F.Supp. 591 No. 94-C-6046 (D.Utah, April 18, 1995), Baird at 604 20
Buell v. Santa Fe Railway Co., 480 U.S. 557, 558, 568 n.15 (March 24, 1987) 9
Celotex Corp. v. Catrett, 447 U.S. 317 (June 25, 1986) 9, 15, 22
Champion v. Artuz, 76 F.3d 483, 486 (2nd Cir. 1996) 15
Charles Christy v. Pennsylvania Turnpike Commission, Robert Brady, John Beschi, Vincent Greco, John Stewart, Civ. A. No. 93-CV-3346, 845 F.Supp. 1097 (March 9, 1994), 54 F.3d 1140, 146, (May 23, 1995), 904 F. Supp. 427 (November 6, 1995) & 912 F. Supp 148 (January 4, 1996). 19
Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 614 (decided June 26, 1996) 22
Connick v. Myers, 461 U.S. 138, 140 (April 20, 1983) ... 17
Dick Dickerson v. Deloyd Quarberg, 844 F.2d 1435, 1440, No.85-1715, (10th Cir., April 25, 1988), [6] p.1440 19
Fred L. Patrick v. Eugene Miller, 953 F.2d 1240, 90-6388 (10th Cir., January 27, 1992) 19

CASES - Continued **PAGES**

Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984) 13
Griffith v. Wainwright, 772 F.2d 882 (11th Cir. 1985) 9, 11, 12, 14
Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir 1991) 9, 11, 12, 13
Henderson v. Inter-Chem Coal Co., 41 F3d 567, 569 (10th Cir. 1994) 20
Hill v. Chief of Police of Hammond, 98 F.R.D. 253 (7th Cir. Court, 1983) 15
Jaxon v. Circle K Corporation, 773 F.2d 1138, 1140, (10th Cir., October 4, 1985 13
Johnson v. Avery, 393 U.S. 483, 485 (February 24, 1996) 15
Keen A. Umbehr v. Joe McClure, 44 F.3d 876 Mo. 94-3022 (10th Cir., January 4, 1995) Umbehr at 881 20
Kibort v. Hampton, 538 F.2d 90, (5th Cir. 1976) 15
Kirkland Massionary, Inc. v. Commissioner, 614 F.2d 532, 534, (5th Cir., March 24, 1980) 21
Klingel v. Eikenberry, 849 F.2d 409 (9th Cir 1998) 8, 11, 12, 13
Margaret Luethje v. Peavine School District of Adair County, 872 F.2d 352 No.87-1528 (10th Cir. 1989) (April 14, 1989) 19
Matsushita v Zenith Radio Corp., 475 U.S. 574 (Marck 26, 1986) 9, 15, 22
McDonnell Douglas Corp. V. Green, 411 U.S. 792 (May 14, 1973) 9, 22
Moore v. State of Florida, 703 F.2d 516, 519 (11th Cir., April 21, 1983) 14, 15
Nader v. Volpe, 466 F.2d 261, 266 (D.C. Cir., July 17, 1972) 21

CASES - Continued **PAGES**

Neal v. Kelly, 963 F.2d. 453 (D.C. Cir. 1992) 15
Perkering v. Board of Education, 391 U.S. 563, 568 (June 3, 1968) 17
Perry v. Sindermann, 408 U.S. 593 (June 29, 1972) .. 17, 18
Rand v. Rowland, 113 F. 3d 1520 (9th Cir June 3, 1997), 154 F. 3d 952 (9th Cir August 27, 1998) 11, 12, 13
Rankin, AL v. McPherson, 483 U.S. 378, 388 (June 24, 1987) 7, 17, 19
Rosina Salazar v. Rio Arriba County, 81 F.3d 173 No. 95-2086 (March 26, 1996) WL 134913 (10th Cir. (N.M.) unpublished disposition 20
Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) .. 13
Rush v. Parham, 625 F.2d 1150, 1154 (5th Cir., September 15, 1980 21
Rutan, et al v. Republican Party of Illinois, et al, 497 U.S. 62 (June 21, 1990) 18, 19
Sellers v. Henmah, 41 F.3d 1100, 1102 (7th Cir., 1994) ... 15
Speiser v. Randall, 357 U.S. 513, 526 (June 30, 1958) ... 18
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (March 4, 1981) 22
Topeka & Santa Fe Railway Co. v. Buel, 480 U.S. 557 (March 24, 1987) 14, 22
Torcaso v. Watkins, 367 U.S. 488 (1916) *17*
Torres v. First State Bank of Sierra County, 550 F.2d 1255, 1257 (10th Cir. 1977) 13
Treff v. Galetka, 74 F3d 191, 193 (10th Circuit) 20
Tuckness v. Runyon, Case No 98-4078 R.D.R. (November 13, 1998) Unpublished 2, 20
Waters v. Young, 100 F.3d 1437, 1442 (9th Cir. 1996) 13
Williams v. Meese, 926 F. 2d. 994 (10th Cir. February 27, 1991) 9

CASES - Continued **PAGES**

Wilma Laidley v. Lantz McClain, 914 F.2d 1386
No. 89-5016 (10th Cir., September 13, 1990)
Laidley at 1392 20
Woulf v. McDonald, 418 U.S. 539, 579 (June 26, 1974) .. 15

STATUTES/RULES/PROVISIONS

1. U.S. Const. Amend. I 3, 5, 8, 9, 15, 16, 17, 18
2. U.S. Const. Amend. V 3, 6, 8, 9, 15, 16
3. U.S. Const. Amend. XIV 3, 6, 9, 10, 11, 16, 17

Americans with Disabilities Act of 1990 (ADA)
Pub. L. 101-336, July 26, 1950, 104 stat.
327 (29 § 706; 42 § § 12101 ... Pub. L.
104-287, § 6 (K), Oct 11, 1996, 110 stat.
3400 (42 § 12161) 16

Age Discrimination Act of 1975; Pub. L. 94-135,
Title III, Nov. 28, 1975, 89 stat 728 16

Age Discrimination in Employment Act of 1967
(ADEA); Pub. L. 90-202, Dec. 15, 1967,
81 stat. 602 (29 § 621 to 634) 16

Uniformed Services' Employment and Reemployment Rights Act of 1994 (VRR Law).
(U.S.E.R.R.A.) Pub. L. 103-353, Oct. 13,
1994, 108 stat. 3149... Pub. L. 104-275,
Title III subtitle B, § 312, Oct. 9, 1996,
110 stat. 3336 (38 § 4301 note) 16, 22

Rehabilitation Act of 1973; Pub. L. 93-112,
Sept. 26, 1973, 87 stat. 355. ..... 3, 16

STATUTES/RULES/PROVISIONS (Continued)

Veterans' Preference Act of 1944 (VPA);
June 27, 1944, Ch. 287, 58 stat. 387. 16

Vietnam Era Veterans' Readjustment Assistance
Act of 1974; Pub. L. 93-508, Dec. 3, 1974,
88 stat 1578 (38 § § 219 ... 4214, 4301...) 16. 22

Civil Rights Act of 1964; Pub. L. 88-352, July 2,
1964, 78 stat. 241. 3

Civil Rights Act 1871; 42 USC § 1981 et seq. 3

Civil Service Reform Act 1978; Pub. L. 95-454,
Oct. 13, 1978, 92 stat. 1111. ..... 10, 16, 19

Postal Reorganization Act; Pub. L. 91-375,
Aug 12, 1970, 84 stat. 719 (...39 § § ...
1001, 1002, 1003, 1004, 1005, 1006 ...). 3, 10, 16

Title 5 USC § 2108(1)(B), (2), (3)(C), § 2301,
§ 2302 ..... 4, 5, 17
Title 18 USC § 201, § 371, § 601, § 1001, § 1512,
§ 1621 et. seq., § 1961 et. seq., § 2071 ..... 4, 5, 23
Title 28 USC § 1254 (1) 3
§ 1361 21
§ 1654 (1982) 15
Title 29 USC § 791, § 794a(a)1,, § 794(d), § 631,
§ 633a 3
Title 38 USC § 2414, § 4311 ..... 4, 22
Title 39 USC § 401(1), § 1005(a)(2) 3, 4
Title 42 USC § 2000 et seq., § 2000e-16, §
2000e-16(C), § 12201-12204, § 12210, §
12111 et seq., § 2000e-2(a),(2), § 1985(3),

§ 1986, § 1981(a), § 1981(C) § 1983 ..... 3, 4, 5, 17

29 C.F.R. § 1614, Federal Sector Equal Employment Opportunity 7, 16
29 C.F.R. § 1625, Age Discrimination in Employment Act 7, 16
29 C.F.R. § 1626, Procedures - Age discrimination in Employment Act 7, 16
29 C.F.R. § 1630, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act 7, 16
29 C.F.R. § 1640, Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination 7, 16

Fed. R. Civ P. 12 (b) (6) Motion to Dismiss 8, 11, 12, 13
Fed. R. Civ P. 56 Summary Judgement 8, 11, 13

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V. CITATIONS of the OFFICIAL and UNOFFICIAL REPORTS

John T. Tuckness v. Marvin T. Runyon, Postmaster General, United States Postal Service, and Richard Ashcraft, 98-4078 RDR, 10th cir 98-3344 are unpublished and are reprinted in the appendix here to 2 app *infra*. The underlying judgement and minute entry of the U.S. District Court District Kansas whose reasoning the Tenth (10th) Circuit adopted are reprinted at 7 app *infra*.

VI. JURISDICTIONAL STATEMENT

This case meets the requirement of the United States Supreme Court Rule 10(a) and (c).

(a) The Tenth (10th) Circuit has entered a decision that conflicts with its own policy with respect to the treatment of Pro Se litigants. This decision is in direct and striking conflict with decisions and policy of the Eleventh (11th) and Ninth (9th) Circuits.

The Tenth (10th) Circuit has decided an important federal question that directly and strikingly conflicts with relevant and recent decisions of the United States Supreme Court.

The order under review was entered September 13, 1999, 2 app.

The Tenth (10th) Circuit entered its final judgement on December 17, 1999, 5 app.

The Court did grant an eleven (11) day extension on November 14, 1999, 6 app.

This Court's jurisdiction is invoked under and pursuant to Title 28 U.S.C. § 1254 (1). This case implicates U.S. Constitutional Amendments I, V, and XIV.

VII. STATUTES INVOLVED

This suit is brought and jurisdiction of this Court is invoked pursuant to Title 39 U.S.C.S. § 401(1) of the Postal Reorganization Act of August 12, 1970, PL91-375 84 stat. 719.

This suit is also brought and jurisdiction lies pursuant to the following four separate sections of Title VII, the Civil Rights Act of 1964, as amended:

(a) Section 701 et seq. and especially § 717, and § 717(c) of the Civil Rights Act of 1964 as amended Title 42 U.S.C.A. § 2000e et seq., § 2000e-16, § 2000e-16(c); The Rehabilitation Act of 1973, § 501, § 504, § 505(a)(1) as amended Title 29 U.S.C.A. § 791, § 794, § 794a(a)(1). Handicap discrimination; Disparate treatment; Disparate impact which incorporates by Title 29 USC § 794(d), The standards of Title 42 USC § 12201-12204 & § 12210 of Title 1 of The Americans with Disabilities Act of 1990 (Title 42 USC § 12111 § et seq.).

(b) and § 701 and § 703 of the Civil Rights Act of 1964 as amended Title 42 U.S.C.A. § 2000e et seq., § 2000e-2(a),(2). Gender discrimination;

(c) and § 408 and § 703 of the Civil Rights Act of 1964 as amended Title 42 U.S.C.A. § 2000e et seq., Title 42 USC § 2000e - 16.

(d) Section 12 and § 15 of The Age Discrimination in Employment Act of 1967, as amended Title 29 U.S.C. § 631, § 633a. Age discrimination.

This suit is also brought and jurisdiction lies pursuant to The Lloyd LaFollette Act of 1912, as amended in The Veterans Preference Act of 1944, as amended, Title 38 USC § 4214, Title 38 USC § 4311, Title 5 USC § 2108(1) (B), (2), (3) (C) as applies to the Veteran's Education and Employment Assistance Act of 1976 and Title 39 USC § 1005(a) (2) as defined under Title 5 USC § 2108(3). Plaintiff is a preference eligible veteran as defined in Title 5 USC § 2108, with a 60% Veterans Administration disability rating, due to combat injuries.

This is also brought and jurisdiction lies pursuant to Title 42 USC § 1983, Class Discrimination.

This suit is also brought and jurisdiction lies pursuant to Title 18 USC et seq.

This suit is also brought and jurisdiction lies pursuant to Chapter 11 Bribery, Graft, and Conflict of Interest, Title 18 USC § 201 Bribery of Public Officials and Witness.

This suit is also brought and jurisdiction lies pursuant to Chapter 19 Conspiracy, Title 18 USC § 371 Conspiracy to Commit Offense or to Defraud United States.

This suit is also brought and jurisdiction lies pursuant to Chapter 29 Election and Political Activities, Title 18 USC § 601 Deprivation of Employment or Other Benefit for Political Contribution.

This suit is also brought and jurisdiction lies pursuant to Chapter 47 Fraud and False Statements, Title 18 USC § 1001 Statements or Entries Generally (a)(1)(2)(3), (C)(1)(2), Title 18 USC § 1001 et seq. Wilful Falsification of Material Facts.

This suit is also brought and jurisdiction lies pursuant

to Chapter 77 Obstruction of Justice, Title 18 USC 1512 Tampering with a Witness, Victim or an Informant, Title 18 USC § 1515 Definitions for Certain Provisions.

This suit is also brought and jurisdiction lies pursuant to Chapter 96 Racketeer Influenced and Corrupt Organizations, A.K.A. the RICO Act, Title 18 USC § 1961 et seq., Title 18 USC § 2071 Concealment Mutilation and Removal of Records.

This suit is also brought and jurisdiction lies pursuant to Title 5 USC § 7702 actions involving discrimination MSPB stays, and Title 5 USC § 2302(a)(1)(2)(A)(i)/(B)(C)(b)(1)(A)(B)(D) (4)(6)(10)(11)(c)(d)(1)(2)(4) which incorporates the statutory requirements and principles of Title 5 USC § 2301, involving violations of law rules and regulations (Violation of Agency Regulation in Action).

This suit is also brought and jurisdiction lies pursuant to Title 42 USC § 1985(3), conspiracy to interfere with civil rights, (depriving persons of rights or privileges); Title 42 USC § 1986, neglected to prevent the conspiracy, Title 42 USC § 1981(a) intentional discrimination, (disability, gender, age, religion). Reverse discrimination on the Plaintiff's right to make and enforce contracts. Failure to consider accommodation as intentional discrimination, Title 42 USC §1981(c) protection against impairment under color of the law.

This suit is also brought and jurisdiction lies pursuant the U.S.C.A. 1, 5 and 14.

(a) Amendment 1. Deprivation of freedom of speech; deprivation of right of association and assembly; deprivation of right to petition the government for redress of grievances.

(b) Amendment 5. Attempted deprivation of liberty to association and political association.

(c) Amendment 14. Equal protection under the applicable laws, rules and regulations pertaining to the persons in his class as a moderately disabled, preference eligible male veteran, over the age of 40; and deprivation of due process in tying First Amendment rights to Plaintiff's property right in his public employment.

VIII. CONSTITUTIONAL PROVISIONS

The First, Fifth, and Fourteenth Amendments.

IX. CONCISE STATEMENT of the CASE

This petition affords the Supreme Court an excellent and very long awaited opportunity to clarify the nature and scope of the individual citizen's right to free speech and to vote, while applying for government employment in non policy making positions.

The appellant, a sixty (60) percent disabled Viet Nam veteran who applied for employment with the United States Postal Service in 1995. In December 1995, the appellant was interviewed by the Postmaster of Topeka, Kansas, Mr. Alfred R. Lewis, **who has himself since been removed for misconduct.**

During the interview, **the appellant was asked unlawful questions as to his political and personal views on matters of public concern as they related to alleged facts, rather than whether he could safely and competently discharge the duties of a postal employee, i.e. a letter carrier.**

At all times the appellant was a qualified, handicapped veteran with a hearing problem defined by Title 29 C.F.R. §§ 1614 et. seq., 1615 et. seq., 1625 et. seq. 1626 et. seq., 1630 et. seq., and 1640 et. seq.

As a result of the unlawful interview, Mr. Alfred R. Lewis generated a grossly distorted picture of the events and had the appellant's name illegally removed from the hiring register. A violation of Federal Law, Rules and Regulations and *Rankin, AL v. McPherson* 483 U.S. 378, 388.

The former (removed) post master conspired with other postal officers and Mr. Richard Ashcraft, the appellant's former employer, to commit perjury. Mr. Lewis, through the guise of the Postal Service contacted Mr. Ashcraft and requested a second very much more damaging performance evaluation "dead animals" to which Mr. Ashcrft admitted perjury in his reply brief, Doc #43, 46 app, Title 18 U.S.C. §§ 371, 1621 et. seq, **to generate a false picture that the petitioner was a crazed and extremely dangerous mad man**, as is evidenced by his letter of January 9, 1996, 40 app, in which he expressed one (1) of his primary reasons, **"you expressed unusual comments about the local courts"**. He asked the plaintiff's opinion. Doc 1, Doc 43... This will be evidenced by Attachment #26, Exhibit #26, sixty-five (65) pages of petition for election of judges of appellant's motion of September 28, 1998, titled PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO STRIKE, DISMISS, OR OVERRULE DEFENDANT RUNYON'S MOTION TO DISMISS, OR IN THE ALTER-NATIVE, MOTION FOR SUMMARY JUDGMENT, Doc. #42. This statement by Mr. Alfred R. Lewis is a very powerful indication of his intent to violate the plaintiff's, or appellant's first and fifth amendment rights, free speech and to vote.

The appellant filed a complaint with the E.E.O.C. The E.E.O.C. judge ruled that the appellant had established a prima faci case of age discrimination.

The appellant filed a civil action in the Federal District Court, Topeka, Kansas. District of Kansas Case #98-4078 R.D.R.

During a pretrial conference, Fed. R. Civ. P.16, scheduling hearing which the petitioner requested to be delayed due to the fact the petitioner was not, obviously was not prepared, Request was denied (August 25, 1996, Doc #35, 40 app), and the magistrate entered an order that stayed any and all discovery until the District Judge ruled on the motion to dismiss, as per Fed. R. Civ. P. 12 (b) (6), while hinting to the Pro Se plaintiff, appellant, that he would be allowed to continue discovery on the age discrimination aspect of the case, 33 app. The United States' attorney expressed Mr. Tuckness' views on this stay, 29 app, page 12, lines 3 through 10, adding **"obviously Mr. Tuckness did not want to agree to that". The appellant again, during the scheduling hearing, revisited this request for a continuance in order to prepare**, 38 app, lines 1 through 16.

The magistrate led the Pro Se plaintiff to believe that he was to oppose a Fed. R. Civ. P. 12 (b) (6) motion to dismiss for "failure to state a claim upon which relief can be granted". Not, I repeat, not a Fed. R. Civ. P. 56 (c) summary judgement. The appellant was never informed that the Fed. R. Civ. P. Rule 12 (b) (6) motion was secretly being converted into a Fed. R. Civ. P. 56 (c) summary judgement (c) motion and proceedings thereon, without giving him any thing like a *Klingel v. Eikenberry* 849 F. 2d 409 (9th Cir 1998) warning, a *Hall v. Bellmon* 935 F. 2d 1106, 1111 (10th Cir 1991) warning or a *Griffith v. Wainwright* 772 F.

2d 882 (11th Cir. 1985) warning. Trial transcript will so reflect.

The order to stay discovery was in direct conflict of the United States Supreme Court decisions *Celotex Corp. v. Catrett* 447 U.S. 317, *Matsushita v. Zenith Radio Corp.* 475 U.S. 574, *Anderson v. Liberty Lobby Inc.* 477 U.S. 242, *Buell v Santa Fe Railway Co.* 480 U.S. 557, 558, 568 n.15, and *McDonnell Douglas Corp. v. Green* 411 U.S. 793.

The District Judge, Richard Dean Rogers, summarily dismissed the whole case in direct violation of the Tenth (10th) Circuit's rule *Hall v. Bellmon* **supra** citing as his foundation ***Williams v. Meese* 926 F. 2d.994, a case where he had been the presiding judge, and which had been overturned in 1991 for the same reasons as the case at instant profligate.**

The Tenth (10th) Circuit has affirmed.

X. SUMMARY of ARGUMENT

The First Amendment in its most fundamental application, strongly supported by the Fifth and Fourteenth Amendments, creates a personal right for each citizen that shall not be infringed upon, and protects the right of every citizen to free speech on subjects, and even to challenge the wisdom and propriety of government actions.

The Fifth Amendment allows the individual citizen to engage in vigorous public action on issues of government policy by voting and petitioning that issues be put on the ballot for a public vote in lawful elections.

The Fourteenth Amendment guarantees Due Process in support of the individual citizen's pursuit of the First and Fifth

Amendments **supra**.

Neither the Postal Reorganization Act of 1970, PL 91-375, 104 stat 327, or the Civil Service Reform Act of 1978, PL 95-454, 92 stat 1111, authorized the United States Postal Service or Mr. Alfred R. Lewis in particular, the right to usurp the intent of the framers of the United States Bill of Rights, the right to vote or freedom of speech or to chill the plantiff's rights to participate therein. The people's right to vote under this amendment is a limitation on, NOT a grant of power, to the Federal Government.

Indeed, viewpoint-based efforts by local and federal officials' efforts to restrict or punish speech and/or voting on matters of public concern, are subject to the most exacting constitutional and judicial scrutiny. The burden in any particular case of demonstrating the propriety of a less rigorous standard of review is borne by the government.

The Court of Appeals incorrectly concluded that the with holding of public employment, like the denial of any other government benefit, in retaliation for an individual's expressive activity serves as an ineffective and unimportant deterrent to free speech, voting and due process. Because such economic reprisals in this case and instance do not permit government entities to accomplish a result they could never achieve directly - the punishment of ideas which those in power find displeasing - adverse actions premised on the right to free speech and the right to vote, do not and never will impose an intolerable burden on freedom of expression and the right to bring that expression to the ballot and vote on it in lawful elections.

It is the professional and personal opinion of the petitioner and the United States Supreme Court along with the public at large, that the government may not, and shall not

therefore, use its economic power to deny employment as an instrument to control or suppress free speech, the right to vote or the right of due process.

XI. ARGUMENT

The Fourteenth (14th) Amendment guarantees due process. It is the appellant's contention, as well as several other circuits, the Eleventh (11th), the Tenth (10th), the Ninth (9th), the Seventh (7th), the Second (2nd), the D.C. Circuit and the Supreme Court, that telling or leading a Pro Se or any other plaintiff, to think he is facing a motion to dismiss, Fed.R.Civ.P. 12(b)(6), by the presiding judge in an official hearing and in cooperation with another judge, then secretly converting the motion after the hearing without informing the plaintiff that he is really going to face a Fed.R.Civ.P.56 summary judgment, (especially after being told he was to oppose a Fed.R.Civ.P. 12(b)(6) motion), constitutes a grave, harmful, grossly prejudicial error, and abuse of judicial discretion by Judge Ronald C. Newman, Judge Richard D. Rogers and the Tenth (10th) Circuit Court of Appeals, **and is a constitutional violation of the Fourteenth (14th) Amendment - Due Process.**

Nowhere in Ms. Nancy M. Caplinger's MEMORANDUM IN SUPPORT OF DEFENDANT RUNYON'S motion to dismiss, July 30, 1998, Doc #23, or her DEFENDANT RUNYON'S motion to dismiss of July 32, 1998, Doc #22, is there any reference to any Fed.R.Civ.P. whatsoever, or any warning as to the requirements and rights of Fed.R .Civ.P.56 as is required by *Rand v. Rowland* 154 F.3d 952, August 27, 1998 (9th Cir.) *Klingele v. Kenberry* 849 F. 2d 409 (9th Cir, 1988), *Griffith v. Wainwright* 772 F.2d 882 (11th Cir., 1985) and *Hall v. Bellman* 935 F. 2d 1106, 1111 (10th Cir, 1991).

As to Mr. Douglas S. Wright's MOTION TO DISMISS OF RICHARD ASHCRAFT, June 25, 1998 Doc #9 to wit:

> "Comes now the defendant, Richard Ashcraft, and moves the court for an order pursuant to F.R.Civ.P. 12(b) dismissing this action for failure to state a claim upon which relief can be granted."

Nowhere does it ever appear again in his memorandum, and it is the only Fed.R.Civ.P. mentioned. No notice in plain English was given as per the Ninth (9th) Circuit's as the *Kringele v. Eikenberry* 849F.2d 409 rule, *Rowland*, *Wainwright* or *Bellman*, **supra**.

After the hearing the appellant read Fed.R.Civ.P. 12 especially Fed.R.Civ.P. 12(d) to wit:

> "(d) **Preliminary Hearings.** The specifically enumerated (1)-(7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgement mentioned in subdivision **(c) of this rule shall be heard and determined before trial on application of any party**, unless the court orders that the hearing and determination thereof be deferred until the trial."

The plaintiff thought he was entitled to a hearing on the matter. Rule 12(d) says so in black and white.

This action is in direct violation of Tenth (10th) Circuit case law cited by Judge Rogers, *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991) referenced in Appellants Appeal brief at pages xx, 9, 11, 12, 13, 14, 15, 18 and 19. It states on page 13 in part:

"'The provisions of Rule 56© for notice to the opposing party and an opportunity for him to serve opposing affidavits are mandatory. Noncompliance therewith deprives the court of authority to grant summary judgement.' *Torres v. First State Bank of Sierra County,* 550 F.2d 1255, 1257 (10th Cir. 1977) (citation omitted). Furthermore, "[d]istrict courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgement proceedings." Jaxon, 773 F.2d at 1140 (quoting *Garaux v. Pulley,* 739 F.2d 437, 439 (9th Cir. 1984)); see also *Roseboro v Garrison,* 528 F.2d 309, 310 (4th Cir. 1975) (pro se plaintiff should 'be advised of his right to file counter affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him')".

This ruling is also in direct violation of Ninth (9th) Circuit policy, *Bellmon* **supra** referenced *Garaux v. Pulley et al* 739 F.2d 437 (9th Cir. 1984), which was recently reaffirmed by *Rand v Rowland* **supra** the Ninth (9th) Circuit. The court sitting EN BANC stated that *Klingel v Eikenberry* 849 F.2d 409 (9th Cir. 1988) is also liberally applied to *Pulley* **supra** the court at pp. 961 stated:

"We do this when the district court converts a Rule 12(b)(6) motion into a Rule 56 motion without proper notice to a pro se litigant. See *Garaux v. Pulley,* 739 F.2d 437, 439 (9th Cir. 1984) (requiring stringent adherence to notice requirement upon conversion of motion to dismiss to motion for summary judgement). See also *Waters v. Young,* 100 F.3d 1437, 1442 (9th Cir. 1996) (failure to give Rule 50(a) notice to pro se litigant constitutes per se reversible error without regard to prejudice). We see no reason to depart

from this practice in the context of a fair notice violation, except in the unusual case."

This case was referenced in appellant's brief at the following pages: 13, 14, 15 and 19.

This ruling is also in direct opposition to the Eleventh (11th) circuit boiler plate or bright line rule in *Griffith v. Wainwright* 772 F.2d 882 (11th Cir. 1985). The Eleventh Circuit Rule provides for extra notice to all pro se litigants facing summary judgement motions; it does not give preferred treatment to prisoners as ours does *Griffith* at 824:

> "[1] Although this case comes before us in the posture of a First Amendment case, we find in unnecessary to reach the question of whether the Appellant here stated a meritorious claim on the constitutional question. Instead, we are compelled by our own precedents to note *sua sponte* that the court below failed to adhere to the dictates of Fed.R.Civ.P. 56(c), which rule requires that summary judgment cannot be entered against a party unless that person has been given express notice, **ten days in advance, of his rights under that rule and how he might best defend them.**"

Griffith at 825:

> "[3] While it is well settled in this Circuit that this requirement does not of necessity require that such notice be given at an oral hearing, *Moore*, 703 F.2d at 519, our jurisprudence requires at least this: that an adverse party must be given express, **ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of**

default. That done, the court may properly take the motion under advisement as of a day certain and may rule on the motion consistent with the dictates of procedural fairness required by Rule 56. *Moore*, 703 F.2d at 519: *Kibort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976)."

This ORDER is also in direct opposition to the following United States Supreme Court cases: *Bounds v. Smith*, 430 U.S. 817, 823 *Woulf v. McDonald*, 418 U.S. 539, 579, *Johnson v. Avery*, 393 U.S. 483, 485. These cases state that litigants have a statutory right to self-representation in civil matters Title 28 U.S.C. § 1654 (1982), **AND THAT THEY MUST BE ENSURED MEANINGFUL ACCESS TO THE COURTS**.

This ORDER is in direct violation of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 referenced in appellant's brief at pp. 5, 6, 8, 18 and 32. *Celotex Corp. V. Catrett*, 477 U.S. 317 referenced at pp. xxi, 5, 6, 8, 9, 16 and 32 in appellant's brief and *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 pp. 15, 16, 17, 18 and 32 of the appellant's brief.

This ORDER is in opposition to the spirit of *Hill v. Chief of Police of Hammond*, 98 F.R.D. 253 (1983) Seventh (7th Circuit) and *Sellers v. Henmah* 41 F.3d 1100, 1102 (7th Cir. 1994) and *Champion v. Artuz* 76 F.3d 483, 486 (2nd Cir. 1996) and *Neal v. Kelly*, 963 F.2d. 453 (D.C. Cir. 1992).

The First and Fifth Amendments guarantee freedom of speech, the right to vote and to petition the government to put issues before the public in lawful elections.

The powers not delegated to the United States government by The Constitution, nor prohibited by it to the

people, are reserved to the people respectively. The people's right to vote is a limitation on, not a grant of power to, the Federal Government.

The first amendment indeed creates a personal right of individual citizen's freedom of speech. Under very narrow appropriate and constitutional conditions it can be subject to some extremely narrow statutory limitations. For example, freedom of speech under the First Amendment can be restricted by punishing the proverbial scream of "Fire!!" in a darkened theater where there is no fire, threats against the president spoken with actual real life malice, or violation of Title 18 U.S.C. § 1621 et seq, perjury.

However, that certainly does not mean that a constitutional right to free speech does not exist, or that there is only a "privilege" to speak. And it most certainly does not mean that Congress and the Federal Government can exercise "prior restraint" such as speech on matters of public concern in private locations or settings, when asked outside of the work area, off duty, privately or during a job interview.

The Postal Reorganization Act of 1970, PL 91-375, and The Civil Service Reform Act of 1978, PL 95-454, does not grant the Postal Service, or Mr. Alfred P. Lewis, the right to violate the United States Constitution (especially the Bill of Rights, the First, Fifth or Fourteenth Amendments), The Americans with Disabilities Act of 1978, PL 101-336; the Civil Rights Act of 1964, Pl 88-352; the Rehabilitation Act of 1973, PL 93-112; the Age Discrimination in Employment Act of 1967 (ADEA), PL 93-112; the Veterans' Preference Act of 1944 (VPA), June 27, 1944 ch. 287; the Vietnam ERA Veterans Readjustment Assistance Act of 1974, PL 93-508, December 3, 1974, 88 stat 1578, Title 38 U.S.C.§ 4214, Title 29 C.F.R. 1614 et seq; the Uniformed Services Employment and Reemployment

Rights Act of 1994 (VRR Law), PL 103-353, October 13, 1994, 108 stat 3149, Title 38 U.S.C. § 4301 et. seq. (USE RRA).

By law the appellant was entitled to an interview under competitive service status - CONGRESSIONAL INTENT is crystal clear, just as in *Rankin, Al vs. McPherson,* 483 U.S. 378, June 24, 1987, 786 F.2d 1233, affirmed if I have it right speech on a matter of public concern "more over, the inappropriate or controversial character of a statement is irrelevant to the question when it deals with a matter of public concern," pp. 384-387. Justice Marshall... protected interest in freedom of speech. *Perry v. Sindermann*, 408 U.S. 593 (1972), even though Ardith McPherson was merely a probationary employee, and even if she could have been discharged for any reason or no reason at all, SHE STILL HAS A RIGHT TO THE FIRST AMENDMENT FREEDOM OF SPEECH GRANTED CERTIORARI, 479 U.S. 913 (1986).

Perkering v. Board of Education, 391 U.S. 563, 568 - Free speech Perkering at 574. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public function but simply because superiors disagree with content of employees' speech." *Connick v. Myers,* 461 U.S. 138, 140 (1983), Connick, 461 U.S. at 146: "7. Even where a public employee's speech does not touch upon a matter of public concern, that speech is not totally beyond the protection of the First Amendment." 42 USCA § 1983 Constitutional Amendment 14 Constitutional Law 90.1 (1): "First Amendment restrains government from retaliating against public employees on basis of employee's speech or association."

Mr. Lewis' question to the petitioner or appellant was in direct violation of the LAW 5 USC § 2302 (b)(8).

Torcaso v. Watkins, 367 U.S. 488 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions state a CONSTITUTIONAL CLAIM.

The First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. See Perry, 408 U.S. at 597 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958): see **supra**, at p. 72.

> "Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. We hold that the rule of Elrod and Brant extends to promotion, transfer, recall and *hiring* decisions..." pp.79 Justice J. Stevens concurring: "There is no merit to the argument that recognition of plaintiffs constitutional claim would be tantamount to foisting a civil service code upon the state." p. 81

Rutan, et al v. Republican Party of Illinois, et al, 497 U.S. 12; an opinion in which J. Brennan delivered the opinion of the court in which White Marshall Blackmun and Stevens J.J. joined. Stevens J., filed a concurring opinion. p. 72

> "For at least a quarter-century, this court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest - especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected

speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. *Speiser v. Randall*, 357 U.S. 513, 526 [(1958)] such interference with constitutional rights is impermissible." Id., at 597 (emphasis added).

Charles Christy v. Pennsylvania Turnpike Commission, Robert Brady, John Beschi, Vincent Greco and John Stewart, Civ. A. No. 93-CV-3346, 845 F.Supp. 1097, 54 F.3d 1140, 146, 904 F.Supp. 427 and 912 F.Supp. 146 basically says:

> The United States Postal Service does not enjoy Eleventh Amendment sovereign immunity. And you cannot practice political patronage with the effort to influence elections like Mr. Lewis has in my case. He violated Titles U.S.C. § 2301(b)(8)(A) and (B). He has used his official authority and influence for the purpose of interfering with and affecting the nomination of election. An act that is expressly forbidden by the Civil Service Act of 1978, P.L. 95-454, 92 Stat. 114.

Rankin et al. v. McPherson 483 U.S. 378 has been upheld by the following cases:

> *Dick Dickerson v. Deloyd Quarberg*, 844 F.2d 1435, No. 85-1715, 1440 (10th Cir. 1988) April 25, 1988. [6] p.1440.
>
> *Margaret Luethje v. Peavine School District of Adair County*, 872 F.2d 352 No. 87-1528 (10th Cir. 1989) April 14, 1989.
>
> *Fred L. Patrick v. Eugene Miller*, 953 F.2d 1240 No. 90-6388 (10th Cir. 1992) January 27, 1992.

Rutan et al. v. Republican Party of Illinois et al., 497 U.S. 62 has also been upheld in the Tenth (10th) Circuit Court of Appeals by the following cases:

Rosina Salazar v. Rio Arriba County, 81 F.3d 173 No. 95-2086 March 26, 1996 WL 134913 (10th Cir. (N.M.) unpublished disposition.

Wilma Laidley v. Lantz McClain, 914 F.2d 1386 No. 89-5016 (10th Cir. 1990) September 13, 1990. Laidley at 1392.

Keen A. Umbehr v. Joe McClure, 44 F.3d 876 (10th Cir. 1995) No. 94-3022 January 4, 1995. Umbehr at 881.

Bruce R. Baird v. Roger F. Cutler, 883 F.Supp. 591 No. 94-C-6046 (D. _____ 1995) April 18, 1995. Baird at 604.

Board of County Commissioners, Wabaunsee County,Kansas v. Keen A. Umbehr, 116 S.Ct 2342, 135 L.Ed.2d 843 No. 94-1654 _____ June 28, 1996.

In Salazar, the Tenth (10th) Circuit Court of Appeals upheld Rutan. Salazar was viewed in the light most favorably to the nonmoving party, *Treff v. Galetka*, 74 F.3d 191, 193 (10th Circuit), according to the benefit of any reasonable inference which may be drawn therefrom, see *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994) and so should *Tuchness v. Runyon*, Case No 98-4078 R.D.R.

XII. CONCLUSION

For the following reasons and cites, the petitioner respectfully requests that a hearing by the United States Supreme Court be convened to set aside, overturn, the ORDER of September 13, 1999, by the 10th Circuit Court of Appeals 98-3344 and the Order of November 13, 1998, by the District Court, District of Kansas (Topeka) 98-4078 R.D.R., and define this conflict between the Tenth (10th) and the Ninth (9th) and the Eleventh (11th) Circuits and grant the following relief, or at the very least, in the Alternative, enter an Order of Mandamus pursuant to Title 28 U.S.C. § 1361 action to compel an officer of the United States to preform his duty which states to wit "the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or agency thereof to preform a duty owed to the plaintiff".

Mandamus is only available under Title 28 U.S.C. § 1361 when (1) the petitioner demonstrates a clear right to the relief sought, (2) the defendant, official or agency owes a specific duty to the petitioner, *Kirkland Masonry, Inc. v. Commissioner* 614 F.2d 532, 534 (5th Cir., March 24, 1980), and (3) no other adequate remedy is available to the petitioner, *Rush v. Parham* 625 F.2d 1150, 1154 (5th Cir., September 15, 1980). Only where there has been a showing of a violation of an agency's authority or a **"manifest infringement of substantial rights irremediable by the statutorily prescribed method of review"**, should a court disregard the prescribed congressional scheme, *Nader v. Volpe*, 466 F.2d 261, 266, (D.C. Cir., July 17, 1972).

In view of the judicial restraint necessary to avoid declaring a congressional scheme or statute unconstitutional when other

relief may be possible, mandamus is appropriate in this case since (1) the appellant, Tuckness, has demonstrated a clear right to the relief sought in light of these very grave constitutional issues, (2) the defendant agency owes a specific duty to the petitioner (Tuckness) **not to violate the United States Constitution**, and to uphold and follow Federal law and congressional mandate.

The Vietnam Era Veterans Readjustment Assistance Act of 1974, P.L. 93-508, Title 38 U.S.C. § 4214 (a)(1) "The United States has an obligation to assist veterans of the Armed Forces... b(1)(B) a veteran shall be eligible for such an appointment without regard.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (VRR Law (U.S.E.R.R.A.), P.L. 103-353 (October 13, 1994), Title 38 U.S.C. § 4301 et. seq. and 4311 discrimination against persons who serve in the uniformed services and acts of reprisal prohibited.

The plaintiff or appellant, was at all times a qualified disabled veteran and even if he was not very well or not a qualified applicant, congressional mandate is crystal clear. The United States Postal Service, the Federal Government, and any agency in the Executive Branch, with few exceptions, owed the appellant a fiduciary duty to hire him and give him a chance to do the job.

However, the plaintiff hopes the court does disturb the congressional scheme for the benefit of other veterans, the public at large, and the government itself.

The plaintiff prays the court to instruct the District Court to allow the plaintiff his rights to discovery as prescribed in the following: *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Celotex Corp. v. Catrett, supra*; *Anderson*

v. Liberty Lobby, Inc., supra; *Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 558, 568 n.15 decided on March 24, 1987; *Colorado Republication Federal Campaign Committee*, 518 U.S. 604, 614, decided June 26, 1996; *Matsushita Ele. Industrial Co. v. Zenith Radio Corp.*, supra.

The plaintiff prays the court that he be allowed discovery by the Federal Rules of Civil Procedure, 27 Depositions, 33 Interrogatories, 36 Requests for Admissions, and 34 Production of Documents, as they can apply generally, and to the following 26.9(k) Individual Employee Personnel Records of EEOC Compliance Manual (Attachment 1, Exhibit 1), three (3) pages of motion for summary judgment, Aplt. App. 75, 76 and 77, Doc.42. Section 26.9(k) states to wit:

> "(k) *Individual Employee Personnel Records* - Such personnel records include job applications and resumes, job and wage history (e.g., entry job and rate of pay; dates of promotion, reassignment, transfer dates, amounts, performance appraisals, letters of recommendation, awards, bonuses, warning and probation letters, union grievances, internal EEO complaints, notices of layoff, recall and termination. Analysis of the above individual personnel records is often essential in scrutinizing a respondent's defenses to a prima facie violation."

The plaintiff respectfully requests that the United States Supreme Court direct the District Court to honor his request for documents and the employee personnel records, and complete copies of all EEOC complaints against them and their final disposition, in their entirety with an accompanying sworn affidavit with each file swearing, or attesting to, that it is the whole file under penalty of perjury, as per Fed. R. Civ. P., Rule 34. This should put a stop to the blatant violation of Title 18 U.S.C. 2071 Mutilation, Removal, and Concealment of Records.

This is necessary in the interest of judicial impartiality. The defendants have the plaintiff's personnel file. The plaintiff has a security clearance and a need to know. This will help him establish a pattern of discrimination. The plaintiff wishes to be afforded the right to serve interrogatories, hold depositions. That he can hold his depositions where and when he wishes. That if he is deposed, it will not be in the United States Attorney's office for obvious reasons, but rather a location some place else, and he be deposed last so he will not have to be bothered with multiple motions for summary judgements every time he turns around. He requests that he be allowed full discovery, requests for admissions also. That this case be allowed to become ripe before any further motions to dismiss under Fed. R. Civ. P. 12(b), 50, 56, be allowed.

Respectfully submitted,

_____
John J. Tuckness
Chief and Lead
Attorney Pro se

SUBSCRIBED AND SWORN TO before me this 18th day of November 1999.

_____
Notary Public

My appointment expires: _____

APPENDICES

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

ELISABETH A. SHUMAKER
CHIEF DEPUTY CLERK

September 13, 1999

Mr. John T. Tuckness
1947 N.W. Lane
Topeka, KS 66608-1638

Douglas S. Wright
2016 S.W. 37th St.
Topeka, KS 66611

Ms. Nancy M. Caplinger
Mr. Jackie N. Williams
Office of the United States Attorney
444 S.E. Quincey
Topeka, KS 66683

Re: 98-3344, Tuckness v. Runyon
Dist/Ag docket: 98-CV-4078-RDR,

Dear Counsel and Mr. Tuckness:

Enclosed is a copy of the order and judgment of the court in the captioned case.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER, Clerk

By:_____
Deputy Clerk

PF:kis
cc: Richard D. Rogers, Sr. District Judge

1 app

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN T. TUCKNESS,

Plaintiff - Appellant,

v. No. 98-3344

MARVIN T. RUNYON, Postmaster General, United States Postal Service, and RICHARD ASHCRAFT, President, Standard-Hart Printing, Co., Inc.,

Defendants - Appellees.

ORDER AND JUDGMENT*

September 13, 1999

Before **BRORBY**, **EBEL**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and condition of 10th Cir. R. 36.3.

34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff John T. Tuckness appeals from the district court's order dismissing in part and granting summary judgment in part to defendants on his complaint against them. He brought the complaint alleging violations of a plethora of civil, criminal and anti-discrimination statutes after the postal service failed to hire him. In a thorough and well-reasoned memorandum and order, the district court granted summary judgment to defendant Runyon on plaintiff's claims for disability and age discrimination. It dismissed the remaining claims for failure to state a claim.

We review de novo both the district court's dismissal for failure to state a claim, see Steele v. United States, 19 F.3d 531, 532 (10th Cir. 1994), and its grant of summary judgment in favor of defendants, see McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998). Having reviewed the parties' briefs and contentions, the district court's order, and the record on appeal pursuant to these standards, this court finds no reversible error. The judgment of the United States District Court for the District of Kansas is therefore AFFIRMED for substantially the same reasons set forth in its memorandum and order dated November 13, 1998. Plaintiff's motion for substitution of his corrected reply brief is GRANTED; his motion to strike defendant Runyon's brief is DENIED.

ENTERED FOR THE COURT
PER CURIAM

---

[1] Plaintiff complains that the district court granted summary judgment for defendants without affording him an adequate opportunity for discovery, thus denying him due process. A magistrate judge assigned to the case stayed discovery pending resolution of the defendants' motions to dismiss or for summary judgment. Plaintiff appeared at the hearing concerning the stay of discovery. Far from objecting to the magistrate judge's decision to stay discovery, he stated that the decision "sound[ed] logical" and that he would "do the same thing if [he were in the court's] shoes." R. Vol. III at 17. Plaintiff did not file an affidavit pursuant to Fed. R. Civ. P. 56(f) in response to the motion for summary judgment. We are therefore bound to consider the record as it stands. See Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1381 (10th Cir. 1988).

Plaintiff also argues that the district court erred in granting summary judgment without providing him with a formal hearing. The parties' right to a summary judgment hearing may be fulfilled by the district court's review of the briefs and supporting materials; a formal hearing with oral argument is not required. See Geear v. Boulder Community Hosp., 844 F.2d 764, 766 (10th Cir. 1988).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN T. TUCKNESS,

Plaintiff - Appellant,

v. No. 98-3344

MARVIN T. RUNYON, Postmaster General, United States Postal Service, and RICHARD ASHCRAFT, President, Standard-Hart Printing, Co., Inc.,

Defendants - Appellees.

ORDER

Filed December 17, 1999

Before **BRORBY**, **EBEL**, and **HENRY**, Circuit Judges.

This matter is before the court on appellant's petition for rehearing and motion for leave to file the petition out of time. The motion for leave to file the petition out of time is denied. The petition for rehearing is denied as untimely.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:_____
Deputy Clerk

5 app

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN T. TUCKNESS,

Plaintiff - Appellant,

v. No. 98-3344

MARVIN T. RUNYON, Postmaster General, United States Postal Service, and RICHARD ASHCRAFT, President, Standard-Hart Printing, Co., Inc.,

Defendants - Appellees.

ORDER

Filed November 4, 1999

Before **BRORBY**, **EBEL**, and **HENRY**, Circuit Judges.

Appellant's motion for extension of time to file a petition for rehearing with suggestion for rehearing en banc is granted in part. Appellant's petition is due on or before November 15, 1999.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

JOHN T. TUCKNESS,	)	
	)	
Plaintiff,	)	
vs.	)	Case No.
	)	98-4078-RDR
MARVIN T. RUNYON, Postmaster General, United States Postal Service and RICHARD ASHCRAFT	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this action, proceeding pro se, against defendants Marvin Runyon, Postmaster General of the United States Postal Service (Postal Service) and Richard Ashcraft, President of Standard-Hart Printing Company. This case arises from the failure of the Postal Service to hire the plaintiff as an employee. This matter is presently before the court upon defendant Runyon's motion to dismiss or, in the alternative, for summary judgment, and defendant Ashcraft's motion to dismiss. Having carefully reviewed the materials provided by the parties, the court is now prepared to rule.

I.

Before we address the merits of the motions filed by the defendants, the court shall consider several motions filed by the plaintiff. On October 5, 1998, plaintiff filed a "motion for

temporary preliminary injunction and stay of proceeding's trial limits". In this motion, plaintiff sought a "time out" in the case for the period from October 5, 1998, to October 15, 1998, so that he could care for his elderly father. This time period has since passed, and we find that no prejudice has occurred to the plaintiff during this period. Accordingly, this motion shall be denied as moot.

Plaintiff has also filed two motions directed at the reply briefs filed by the defendants. Plaintiff seeks to strike the reply filed by defendant Ashcraft to plaintiff's response to Ashcraft's motion to dismiss as untimely. The court notes that the plaintiff is correct that the reply by defendant Ashcraft was not timely filed. However, since plaintiff has suffered no prejudice as a result of this untimely filing, the court shall consider it. Accordingly, plaintiff's motion shall be denied. Plaintiff has also filed a motion to surrebuttal brief to defendant Runyon's reply to plaintiff's response to defendant Runyon's motion to dismiss or, in the alternative, for summary judgment. Neither the Federal Rules of Civil Procedure nor the local rules allow the filing of a brief beyond the filing of a reply brief. Never-theless, the court shall consider the plaintiff's recently filed brief as a surrebuttal brief because we find no prejudice to defendant Runyon. Accordingly, plaintiff's motion shall be granted.

II.

The court shall now turn to the motions filed by the defendants. Defendant Runyon seeks dismissal or summary judgment on all of the claims asserted by plaintiff. Defendant Ashcraft seeks dismissal of all claims for failure to state a claim upon which relief can be granted or lack of subject matter jurisdiction.

A motion to dismiss under Fed.R.Civ.P. 12 (b) (6) cannot be granted unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. Maez v. Mountain States Tel. and Tel., Inc., 54 F.3d 1488, 1496 (10th Cir.1995); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir. 1991). In consideration of such a motion, the court must construe liberally the pleadings and indulge all favorable inferences in favor of the plaintiff. Lafoy v. HMO Colorado, 988 F.2d 97, 98 (10th Cir. 1993); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991). The court, however, need not accept as true those allegations that are conclusory in nature, i.e., which state legal conclusions rather than factual assertions. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. Barber v. General Electric Co., 648 F.2d 1272, 1276 n. 1 (10th Cir. 1981). Summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). Under this rule, the initial burden is on the moving party to show the court "that there is an absence of evidence to support the non-moving party's case". Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. at 323.

Once the moving party has met these requirements, the burden shifts to the party resisting the motion. The non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial". Id. at 322. The party resisting the motion "may not rest upon the mere alle-

gations or denials of his pleadings . . ." to avoid summary judgement. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The mere existence of a scintilla of evidence will not avoid summary judgment; there must be sufficient evidence on which a jury could reasonably find for the non-moving party. Id. at 251 (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872).

Plaintiff's complaint contains 63 pages with 80 pages of attachments. The complaint is anything but a "short and plain statement". It is a mishmash of factual allegations, editorial comments and legal conclusions. It is at times rambling and incomprehensible. It is sprinkled with sarcasm and invective. Plaintiff's complaint arises from the decision of the Postal Service not to hire him after he interviewed for a position. During the interview process, the Postal Service contacted Standard-Hart Printing, plaintiff's former employer, and requested some information on a form. Plaintiff's claims against Ashcraft's response to the Postal Service's request.

The complaint contains seventeen designated counts. Although his claims are not clearly stated, it appears that he alleges that he was discriminated against on the basis of gender, age, religion and handicap when he was not selected for employment by the Postal Service. With regard to his discrimination claims, he alleges jurisdiction based on Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 700 et seq.; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631 et seq.; and the Civil Rights Act of 1871, 42 U.S.C. § 1981, 1983, 1985 and 1986. He also asserts violations of the Postal Reorganization Act, 39 U.S.C. § 401(1); the Veterans Preference Act, 5 U.S.C. § 2108; the Vietnam Era

Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 4211 et seq.; and various federal administrative regulations and federal criminal statutes and provisions of the United States Constitution. Finally, plaintiff has made various claims based upon a breach of a collective bargaining agreement.

III.

Runyon contends in his motion that many of plaintiff's claims should be dismissed for failure to state a claim upon which relief can be granted. He also asserts that he is entitled to summary judgement on the other claims because no genuine issue of material fact exists. In his motion he sets forth fifteen undisputed material facts. Plaintiff "responded" to this motion with a 105 page pleading entitled "Plaintiff's Motion for Summary judgement, or in the Alternative, Motion to Strike, Dismiss, or Overrule Defendant Runyon's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment". The "brief" filed by the plaintiff fails to comply with D.Kan. 56.1 in that it fails to directly respond to Runyon's statement of undisputed facts. During the course of the brief, plaintiff quibbles with certain facts but fails to cite to any portion of the record as support for his position. He fails to attach a single affidavit to his response. Rather, he has attached a variety of inane and seemingly irrelevant documents such as a sixty-page petition with signatures seeking the election of state district judges in Shawnee County, Kansas; a newspaper article referring to the conviction of a man for sexual assault for molesting a young girl; a newspaper article referring to a young girl's lawsuit against a state agency relating to sexual abuse; and a section from what appears to be a union contract regarding "management rights. Plaintiff has also submitted various affi-davits from postal employees who were involved in the decision not to hire him. The court is not persuaded that the plaintiff has properly controverted any of the

facts set forth in Runyon's motion. Accordingly, we could simply accept the facts as set forth in Runyon's motion. The court, however, has made every effort to examine the entire record before the court and determine the uncontroverted facts that are present. In this regard, we note that there is little dispute as to what occurred during the hiring process. Plaintiff denies he made the exact statements set forth by Postal Service employees, but he acknowledges that he made statements that were similar in style and meaning to those set forth by the Postal Service employees.

A.

On November 21 and 22, 1995, plaintiff was interviewed by Jim Wolf, manager of Distribution Operations at the Postal Service's Processing and Distribution facility in Topeka, for the position of mail processor. During the interview, plaintiff acted in a strange manner, particularly in giving a number of odd and inappropriate answers to standard questions. Mr. Wolf concluded that he had interviewed dozens and dozens of people, but that he had never encountered anyone who was clearly not suited for postal employment. Plaintiff was not hired for the position, but his name was placed back on the hiring register for consideration in future vacancies.

On December 13, 1995, plaintiff interviewed with Doug Farmer, manager of the Postal Service's Sherwood Carrier Annex, for a position of rural carrier. Prior to the interview, plaintiff contacted Farmer and stated he would be "punctual, barring any unforeseen events such as engine failure, car wreck. or disaster, manmade or natural, or nuclear blast." During the interview, plaintiff indicated that he would not guarantee his availability for work all of the time because "you don't know when someone could walk in the back door with a shotgun and

blow you away or we might even be nuked, you just don't know." Plaintiff decided after the interview that he was not interested in the job because he was presently taking classes at Washburn University. Consequently, Farmer did not consider plaintiff for the position.

On December 13, 1995, the Postal Service sent a form to Standard-Hart Printing, who plaintiff had designated as a prior employer, asking for certain information about plaintiff's prior employment. This form was filled out by defendant Ashcraft and returned to the Postal Service on December 14, 1995. On the form, Ashcraft noted that plaintiff had been employed at Standard-Hart Printing from March 26, 1993, to June 18, 1993, as a folder helper. He noted that plaintiff had been terminated. He stated that he would not rehire plaintiff because he was "disruptive".

On December 22, 1995, plaintiff was interviewed by Alfred Lewis, Topeka Postmaster, for a carrier position. During the interview, plaintiff expressed unusual comments about the local courts and even discussed how he could shoot Lewis and nothing would be done. In his complaint, plaintiff acknowledged that he made the following comment to Lewis: "The court system is so corrupt that if I was in tight with, and knew friends of the courts, I could shoot you and nothing would be done about it". Plaintiff also discussed his deceased wife and mother-in-law and showed Lewis photographs of them.

On January 9, 1996, Lewis wrote plaintiff the following letter:

> This refers to your application for City Carrier in this office.

During your recent interview you expressed unusual comments about the local courts and even discussed how you could shoot me now and nothing would be done. I find this atypical behavior for any person trying to secure employment. In checking with other supervisors who have interviewed you for other positions within the Postal Service, I found that many times your conversations would lead to discussions of shootings, "nuking", and other violent situations.

A review of your past work history reflects you have been terminated from one job and another employer indicates they would not rehire you because you were disruptive.

After careful consideration, it has been determined that you are not a good candidate for Postal employment.

You may make a written request for reconsideration of this decision within 15 calendar days from the date of this letter. Your request must be addressed to me at 424 S Kansas Ave., Topeka KS 66603-9998.

On January 24, 1996, plaintiff responded with, inter alia, the following comments:

I never said in any shape, way or form that I was going to launch a nuclear strike against anyone. First, I do not know of anyone who sells nuclear devices, Uranium U or any special isotopes, U235 or U238 or Plutonium PU. Second, I am not going to spend any of my money on these items. Somebody else's maybe, but I can assure you I am not going to use my money, period. Third, I have no inten-tions of buying an atom bomb or hydrogen bomb in the first place!! Where you ever got this idea is beyond my wildest dreams,

and so far removed from anything I can think of as to be clear across the globe.

I did not say anything to you that Dr. Martin Luther King has not said to others. The system is corrupt. Your letter reflects to me that you already had your mind made up before you talked to me. You heard only what you wanted to hear and nothing else.

In case you do not remember Dr. Martin Luther King, he made a march in Alabama to protest what I was talking to you about. I want to set the record straight. I have no intentions of shooting you personally, or anybody else for that matter. I could have said it the other way and you would still have heard what you wanted. The court is so corrupt, if you had the right connections, you could poison me and nothing would be done. To blackball me from the right to make a living, merely to get even with me for my activity concerning the court, is a mistake. It will not be worth what little political help you get toward your next appointment.

Lewis advised plaintiff in a letter dated January 29, 1996, that the information in his letter of January 24th had not changed his decision that plaintiff was not a good candidate for postal employment. He further noted that plaintiff's letter reflected a "very negative attitude".

Plaintiff subsequently filed an equal employment opportunity complaint alleging discrimination based upon age, disability and religion. An administrative law judge granted summary judgment to the Postal Service on all claims. He determined that plaintiff had failed to establish a prima facie case of religious or disability discrimination. He further found that although plaintiff had established a prima facie case of age discrimination, the Postal

Service had presented legitimate, nondiscriminatory reasons for the decision not to hire plaintiff.

Plaintiff sought review of the administrative law judge's decision with the Merit Systems Protection Board. The Board found that it lacked jurisdiction to consider an agency's decision not to hire or select an applicant.

B.

As we move to address the various claims asserted by plaintiff, we again reiterate that they are unclear. The court shall address the various statutes cited by the plaintiff even though he fails to make a cogent factual claim for application of these statutes.

42 U.S.C. §§ 1983, 1985 and 1986

As with many of plaintiff's claims, he has referred to these statutes but failed to indicate how they apply. Plaintiff has not stated a claim under 42 U.S.C.§ 1983 because he has failed to assert any link to action under color of state law. Persons v. Runyon, 998 F.Supp. 1166, 1171 (D.Kan. 1998). Plaintiff has also failed to state a claim under §§ 1985 or 1986. Id. at 1173.

Title 5 and the Code of Ethical Conduct

In several counts, plaintiff asserts that Runyon has acted in violation of plaintiff's rights under the Code of Ethical Conduct for Postal Employees, 39 C.F.R. § 447.11 et seq., and various sections of Title 5 of the United States Code as well as accompanying regulations. These various statutes and regulations do not provide a cause of action here because plaintiff either lacks standing to bring a claim based upon them or has failed to exhaust his administrative remedies under the Civil Service Reform Act. Persons, 998 F.Supp. at 1173-74.

Breach of Collective Bargaining Agreement

Plaintiff has suggested that Runyon's actions breached a collective bargaining agreement. Plaintiff has failed to properly allege that he was protected by any collective bargaining agreement. Of course, since plaintiff was not employed by the Postal Service and, therefore, was not a member of the Postal Service employees' union, then he cannot assert any claims of breach of any agreement that may exist between the Postal Service and the union of its employees, the National Association of Letter Carriers. Accordingly, these claims must be dismissed.

Claims Under the United States Constitution

Plaintiff has alleged that the actions of Runyon violated his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. He fails to articulate how such violations occurred, but he does occasionally mention due process. These claims must be dismissed because the defendant is immune from being sued for constitutional torts. Persons, 998 F.Supp. at 1172.

Veterans Preference Act/Vietnam Era Veterans Readjustment Assistance Act

Plaintiff appears to assert several claims under the Veterans Preference Act of 1944, 5 U.S.C. § U.S.C. § 2108, and the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 4211 et seq. These Acts do not confer a private right of action. Persons, 998 F.Supp. at 1172. Accordingly, these claims must be dismissed.

Criminal Statutes

Plaintiff has alleged that many of the actions of the Postal Service constituted violations of a multitude of criminal statutes. Civil causes of action, however, do not generally lie under the

criminal statutes contained in Title 18 of the United States Code. See Johnson v. Cullen, 925 F.Supp. 244, 251 (D.Del. 1996); Michelson v. Merrill Lynch. Pierce. Fenner & Smith. Inc., 669 F.Supp. 1244, 1254 (S.D.N.Y. 1987). Most of the statutes cited by plaintiff are not exceptions. Plaintiff does, however, rely upon the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., as a basis for one of his claims. RICO does provide a civil cause of action for " [a]ny person injured . . . by reason of " a violation of that statute. 18 U.S.C. § 1964(c). "To survive a Rule 12(b)(6) motion, a civil RICO claim must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity". Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989) (quotations omitted). Plaintiff's complaint falls woefully short of stating a RIC0 claim. In sum, plaintiff's purported claims under a variety of criminal statutes must also be dismissed.

Employment Discrimination

Plaintiff has vaguely asserted that he was discriminated against by the Postal Service because of his gender, age, religion and disability. The court finds that Runyon is entitled to dismissal or summary judgment on all of these claims. We note initially that plaintiff's claim of gender discrimination must be dismissed for failure to exhaust administrative remedies. Plaintiff made no mention of gender discrimination in his administrative complaint. His failure to raise it bars any Title VII claim based upon gender discrimination since the court finds that gender discrimination is not "like or reasonably related" to the other allegations in the plaintiff's administrative complaint. See Luttrell v. Runyon, 3 F.Supp.2d 1181, 1189 (D.Kan. 1998).

The defendant must also be granted dismissal or summary judgment on plaintiff's claim of disability discrimination. First,

there is no evidence in the record that shows that plaintiff suffers from a "disability" as set forth in the ADA or the Rehabilitation Act. The ADA defines an individual with a disability as one who has a "physical or mental impairment which substantially limits one or more of such person's major life activities" or has a record of such an impairment or is regarded as having such an impairment. 29 U.S.C. § 705 (8) (B). The Rehabilitation Act incorporates the substantive standards of the ADA. 29 U.S.C. § 791(g). Plaintiff has presented only a document from the Veterans Administration that indicates he has only a 10% service-connected disability with respect to "tinnitus" and that he has a less than 10% disability with respect to his claim of hearing loss. This document fails to establish a disability as defined in the ADA. Second, the record is devoid of any evidence that the individuals at the Postal Service were aware of his "tinnitus" condition. Plaintiff has failed to come forward with any evidence that he made this condition known to the Postal Service. See Miller v. National Casualty Co., 61 F.3d 627, 630 (8th Cir. 1995). In his complaint, he suggests that he told Postmaster Lewis that he could not hear "long complicated instructions". This lone comment is simply insufficient to provide adequate notice of an ADA disability.

The defendant is also entitled to summary judgment on plaintiff's claim of religious discrimination. We note initially that plaintiff has failed to state a claim of religious discrimination. Although mentioned in his complaint, he provides no allegations to support this claim. The record is also devoid of any evidence of discrimination based upon the plaintiff's religion or any of his religious practices. There is no evidence that the Postal Service was even aware of the plaintiff's religion. For all of these reasons, Runyon is entitled to dismissal and summary judgment on this claim.

Finally, we turn to plaintiff's claim of age discrimination. Once again, plaintiff has failed to come forward with any evidence of age discrimination. We do note that the administrative law judge found that plaintiff had submitted a prima facie case of age discrimination. Apparently, the evidence must have shown that plaintiff was a member of a protected class that individuals outside the protected class were chosen for employment. The record before the court fails to support that factual finding, but we shall nevertheless follow it. Even if plaintiff has established a case, the uncontroverted record shows that the defendant had a legitimate, nondiscriminatory reason for not hiring plaintiff. The record further shows that plaintiff has not demonstrated that this reason was a pretext for discrimination. Accordingly, Runyon is entitled to summary judgment on this claim as well as all of the other discrimination claims.

In sum, defendant Runyon is entitled to dismissal or summary judgment on all of plaintiff's claims.

IV.

The court shall now turn to the motion to dismiss filed by defendant Ashcraft. Ashcraft contends that plaintiff has failed to state a claim against him upon which relief can be granted.

The claims against Ashcraft are far more obscure than those against Runyon. In the 63-page complaint, Ashcraft is mentioned in only six paragraphs. Plaintiff has not stated any separate claims against Ashcraft. In fact, Ashcraft is not mentioned at all in any of the seventeen counts listed separately in the complaint

After a thorough review of the complaint, the court is convinced that the plaintiff has failed to state a claim against

defendant Ashcraft upon which relief can be granted. The aforementioned discussions apply as well to defendant Ashcraft. There are also several additional that apply specifically to Ashcraft. For example, the employment discrimination claims brought by plaintiff under Title VII, the ADEA and the ADA must fail for other reasons. Plaintiff has not exhausted his administrative remedies under these Acts with regard to defendant Ashcraft. The administrative discrimination complaint filed by plaintiff named only the Postal Service; it made no mention of Ashcraft or Standard-Hart Printing. The failure to name Ashcraft as a respondent in the administrative charge under the circumstances of this case requires dismissal of these claims. See Romero v. Union Pacific Railroad, 615 F.2d 1303, 1311-12 (10th Cir. 1980). In addition, it appears that Standard-Hart Printing is not an employer under Title VII, ADEA or the ADA because it does not employ fifteen employees. See 42 U.S.C. § 2000e (b); 29 U.S.C. § 630(b); 42 U.S.C. § 12111(5). Accordingly, Ashcraft cannot be an employer under these Acts. In sum, the court finds that Ashcraft is entitled to dismissal of all of the claims contained in the complaint.

Ashcraft has argued that with the dismissal of plaintiff' 8 claims he is entitled to attorney's fees based upon 28 U.S.C. §1919. We do not agree. This statute allows the court to impose "costs" when a case is dismissed for lack of jurisdiction. Costs, under this statute, do not include attorney's fees. Wilkinson v. D.M. Weatherley Co., 655 F.2d 47, 48-49 (5th Cir. 1981); Signorile v. Quaker Oats Co., 499 F.2d 142, 146 (7th Cir. 1974) Barron's Educational Series. Inc. V. Hiltzik, 987 F.Supp. 224, 225 (E.D.N.Y. 1997). Accordingly, this request of the defendant shall be denied.

IT IS THEREFORE ORDERED that defendant Runyon's motion to dismiss or, in the alternative, for summary judgment

(Doc. # 22) be hereby granted.

IT IS FURTHER ORDERED that defendant Ashcraft's motion to dismiss (Doc. # 9) be hereby granted.

IT IS SO ORDERED.

Dated this 12th day of November, 1998 at Topeka, Kansas.

/s/ RICHARD D. ROGERS

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

JOHN T. TUCKNESS,

Plaintiff,

CIVIL NO. 98-4078-RDR

MARVIN T. RUNYON, Postmaster General, United States Postal Service, and RICHARD ASHCRAFT,

Defendants.

( ) JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) DECISION BY THE COURT. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Runyon's motion to dismiss or, in the alternative, for summary judgment be hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Ashcraft's motion to dismiss be hereby granted.

Entered on the docket 11/13/98

Dated: November 13, 1998 RALPH L. DeLOACH, CLERK

_____

Deputy Clerk

THE COURT: All right.

MR. TUCKNESS: I don't mean to be impertinent or rude or anything, your Honor.

THE COURT: Well, it's not taken that way. But I'm just wanting to see that you have every opportunity to present your case and it's best done with someone with legal training. But—

MR. TUCKNESS: That's true.

THE COURT: We'll go forward on the basis that you're going to represent yourself in the proceedings.

MR. TUCKNESS: I'll try to give a respectable and courteous presentation as much as I know how, your Honor.

THE COURT: All right. Well you can be seated for the moment.

Both defendants have filed motions to dismiss in the case and I take it the defendants view those motions, if they were granted, would be totally dispositive of all issues; is that correct?

I haven't compared it to all the claims.

MS. CAPLINGER: Yes, your Honor.

MR. WRIGHT: That's correct.

THE COURT: If we were to engage in discovery in this case, what discovery would you

think, Mr. Tuckness, that you'd want to engage in? What would you want to do.

MR. TUCKNESS: Well, I had just conversed with the US attorney about making applications under a right that's afforded the Government from the EEOC compliance manual to request complete and total personnel files of all the people involved to see

if— how many complaints they've had lodged against them; the name of the complaints and the actual total disposition of the complaints to try to establish a pattern of discrimination, your Honor, would be the first thing I'd try to do after I get my list together.

I'm working on it now. I have 19 people so far that are of interest to me that I think will have a bearing on this case. To establish a pattern of discrimination is not easily done with a very narrow context. You have to get an overall point to say such as you look at the football field, you can see front, back, forward and rears.

So I can perhaps maybe establish a pattern of discrimination. That would be the first thing that comes to mind, your Honor, and I guess as things roll along and I become more cognizant there will

probably be more intricate, realistic legal

questions that might have to be addressed but that would be the first thing to start off with, just to get an overview of the players involved.

THE COURT: So your first request is going to be that the Government— the postal service provide 17 files?

MR. TUCKNESS: No, it would be more than that but they would be certified as true and complete files under penalty of perjury or some other way that they would have the complete file.

With my own EEOC file that I was able to obtain, I noticed that there are a number of interesting discrepancies that are subtle but since I was personally involved I think I have a better perspective of what physically might have transpired

along the way.

Am I speaking properly enough?

THE COURT: You're okay. So whatever number that is, of files that you're requesting, once you get those files is there any other discovery you intend to undertake that you know about now?

MR. TUCKNESS: Well, we'll have to have the usual interrogatories and then send them out to see what we could do and then maybe the ones that

look interesting, some depositions, admissions and then there could be some other things that develop as I think it's a Federal rule of civil Procedure 15 for what I'm actually able to brig forth in writing that would be recognizable in the eyes of the law and then might tend to modify some things as opposed

to what my own personal opinion would be.

So it probably would be the whole spectrum that's allowed to any attorney, but I can't do it all in five minutes, I have to kind of work through it one thing at a time. Like I've already answered one motion to dismiss. Now, I'm going to address the United States Attorney's motion for summary judgment as quickly as I can.

THE COURT: Well, you've only got a limited amount of time to do that in.

MR. TUCKNESS: Yes, sir, and I'm perspiring.

THE COURT: So—

MR. TUCKNESS: I've allowed— you know-- realistically, you know, doing everything I possibly can to answer in a— you know, some kind of a fashion that would be palatable to the Jurist. But

we really haven't had the meeting, but I have Form 35 before me and I kind of got an idea but that's

pretty— well, just a start and I can't give you a guarantee on the finish because I really haven't gotten through all of it yet, your Honor.

THE COURT: All right. What about the postal service's view about what discovery would be, if the court were to allow the mater to proceed on a discovery basis at this time?

MS. CAPLINGER: Well, your Honor, since Mr. Tuckness was not hired by the postal service there would not— I would not see that there would be a lot of individuals involved at the postal service. There are three individuals who interviewed him and made decisions regarding— you know, non-hire decisions.

So those would be the people that I would focus on and I presume those would be the people that Mr. Tuckness would focus on. But as far as discovery, I think I would probably, at least, take Mr. Tuckness' deposition, but I think what I'd end up doing is filing another motion for summary judgment immediately after that saying the same thing I said in my motion to dismiss.

So I— I've told Mr. Tuckness I feel like this would be a good case to postpone discovery, particularly the kind of paper discovery that he's

talking about, until after the motion to dismiss has been ruled on.

I think it would save the Court a lot of time. I think it would save the parties a lot of time to get a ruling on that Motion to Dismiss, and

if it's dispositive, we will— we won't need discovery obviously.

So that's what I had proposed to him but, you know, obviously Mr. Tuckness did not want to agree to that and if he's talking about—

THE COURT: Then I take it from your point of view, all you would intend to do at this point would be to take Mr. Tuckness' deposition because you'd have the postal service people available to you otherwise?

MS. CAPLINGER: I think that's probably right. I might send a request for admissions but I don't think I'd do a lot more than that. I think the time factor, to be totally honest, your Honor, would come— if he's really intending to ask for this kind of discovery, it would come in the form of motions. Motions to Compel.

Because I'm not planning to produce those kind of files considering what, you know, his case appears to be about. I would certainly have some

objections to what he's indicated he would be requesting and I think the time would probably come about disagreements about the scope of discovery.

But I, myself, would probably only take Mr. Tuckness' deposition and do some limited paper discovery.

THE COURT: All right. Mr. Wright, as to Standard-Hart Printing Company?

MR. WRIGHT: Actually I think the defendant is Richard Ashcraft, an individual. I don't believe that the corporation is the defendant the way it's captioned. That's not the way I viewed it in any event.

We have filed a motion to stay discovery that the Court overruled and that motion is our position, that discovery should be stayed until after—

THE COURT: That isn't the Court's question. The Court's question is what discovery would you anticipate if discovery were allowed?

MR. WRIGHT: We would not anticipate any depositions. I don't think it would be meritorious to take Mr. Tuckness' deposition at this point. The only thing I can think we might do is to submit a request for admissions.

THE COURT: Okay. Mr. Tuckness,

many times in cases where we've got these motions pending, we sometimes defer discovery until the motion is resolved, from the standpoint that if the Court were to grant this motion, then the lawsuit

would be over.

If the Court denies the motion, based on the one, certainly, that the postal service has filed the Court might deny part of the motion and grant part of the motion.

There's all kinds of claims that are set out in the case. Some of them just from looking at it real quick, I think the Court's probably going to grant.

MR. TUCKNESS: Their motion for summary judgment?

THE COURT: On the postal service's motion there are probably some of those portions, it looks to me like, might be granted. Others the Court may or may not. But if the Court were to grant part of the claims, it would certainly change what the parties would do in discovery.

Of course, if the Court granted the motion altogether the case would be over and discovery would be wasted.

MR. TUCKNESS: Yes, sir.

THE COURT: But the Court might hone back the case a little bit leaving the case there and make it easier to participate in discovery. The other side of this is that at this time you've probably got your hands full, at least in the immediate future—

MR. TUCKNESS: If they wish, the postal—

THE COURT: --to respond to the postal service's motion by the 11th of September apparently.

MR. TUCKNESS: Uh-huh.

THE COURT: That what you understand 13

the date to be?

MR. TUCKNESS: Yes sir. Their request to postpone discovery for a short time is all right with me. I mean it seemed logical and the intelligent thing to do. I would probably make the same request myself.

So if they want to put it off for a week or two until I address the motion from the US attorney, it seems like it's just common sense. The only thing the plaintiff's really concerned about is once the issue had been addressed for the summary judgment, then we go forward, then at that time in a realistic fashion for discovery.

THE COURT: Well, but if I, if I postpone discovery it isn't going to be a week or two it's going to be until the Court decides the

motions.

MR. TUCKNESS: That— I thought I said that, until you ruled, I apologize.

THE COURT: Well, you— I'm not going to rule on it. Judge Rogers is going to rule on it.

MR. TUCKNESS: Oh.

THE COURT: On those two motions that are pending. But I can tell you it won't be a week or two before he rules on it. For one thing, your answer— answering brief to the postal service's motion isn't due until September 11th .

MR. TUCKNESS: Yes, sir.

THE COURT: And if you file that on September 11th, then there's a reply period—

MR. TUCKNESS: Yes, sir.

THE COURT: — for the postal

service, so it's going to be pretty much the end of September before the Court's even going to—

MR. TUCKNESS: I understand now.

THE COURT: — pay any attention at all to this motion. And then the motion's going to

take its place with other motions in other cases, and Court decided. So it would probably be several months before the court will decide this motion.

MR. TUCKNESS: It would just give me more time to prepare.

THE COURT: But it would give you time to prepare and it would give all of us a better idea on what the Trial Judge thinks may be in the case.

MR. TUCKNESS: It sounds logical, your Honor.

THE COURT: And I'm kind of inclined to do, to do that. And see how many of your claims survive that motion.

MR. TUCKNESS: I would do the same thing if I was in your shoes, your Honor.

THE COURT: Well, I think we're going to do that. Rather than schedule the case, I think I'm going to stay discovery in the case until we get a ruling by the Court. When we get a ruling by the Court, then I'm going to hold the scheduling— another scheduling conference, and at that time I'm going to schedule the case.

But at that conference I'm also going to take up the scope of discovery issue, so that we won't ...

It can make a difference. Also I have a Motion to Compel before the Court. I would wand to

know what the Court's going to do with that. I didn't attend any meetings, I made an effort and have tried to work out something but if we want to table that for a while.

THE COURT: I think I overruled that motion.

MR. TUCKNESS: I never got anything so-- it doesn't matter though.

THE COURT: I think that's because I just signed the order yesterday.

MR. TUCKNESS: Well, then it's moot now.

THE COURT: At this point, it's moot. I overruled it because I was going to have this conference today one way or another.

MR. TUCKNESS: Well, it's now.

THE COURT: Because in these kind of cases, particularly where individuals are

represented— are not represented by lawyers, I like to get everybody together in the courtroom where I can talk to them.

MR. TUCKNESS: Sounds logical.

THE COURT: And so I generally would not grant a motion which would require the parties...

Personnel, Central Plains District

UNITED STATES
POSTAL SERVICE

January 9, 1996

John T. Tuckness
1947 NW Lane
Topeka, KS 66608-1638

Dear Mr. Tuckness:

This refers to your application for City Carrier in this office.

During your recent interview with me **you expressed unusual comments about the local courts** and even discussed how you could shoot me now and nothing would be done. I find this atypical behavior for any person trying to secure employment. In checking with other supervisors who have interviewed you for other positions within the Postal service, I found that many times your conversations would lead to discussions of shootings, "nuking", and other violent situations.

A review of your past work history reflects you have been terminated from one job and another employer indicates they would not rehire you because you were disruptive.

After careful consideration, it has been determined that you are not a good candidate for Postal employment.

You may make a written request for reconsideration of this decision with 15 calendar days from the date of this letter. Your request must be addressed to me at 424 S Kansas Ave., Topeka,

KS 66603-9998.

Sincerely,

Alfred R. Lewis
Postmaster, Topeka, Kansas

cc: HWS 95-00475

DEPARTMENT OF VETERANS AFFAIRS
Medical & Regional Office Center
5500 East Kellogg Avenue
Wichita Kansas 67218-1698

MAR 12, 1999

JOHN T TUCKNESS
1947 NW LANE ST
TOPEKA KS 66608

In Reply Refer To: 452/211
C26 737 022
Tuckness, John T.

Dear Mr. Tuckness:

We made a decision on your compensation claim.

What We Decided

We found the following disability is service-connected. We found your post-traumatic stress disorder 50% disabling.

Well Grounded Claim

A well grounded claim has evidence that shows you might qualify for the benefit requested. You didn't give us the information we need to consider your claim for vertigo.

You need to send us the evidence cited in attached rating decision within one year from the date of this letter if you wish to reopen your claim for this condition.

The overall or combined evaluation of your service-

connected disabilities is 60% from February 23, 1998.

How We Made Our Decision

We carefully considered all the evidence we received. We have attached a copy of the Rating Decision. It shows the evidence we used and the reasons for our decision.

Your Monthly Compensation

Your monthly compensation is shown below. Please understand that the law (38 U.S.C. 5111) says payments must begin the first day of the month after you've become entitled to the benefit.

Starting March 1, 1998, you're entitled to $717.00 monthly because the overall or combined evaluation of service-connected disabilities increases.

Starting December 1, 1998, you're entitled to $726.00 monthly because of a cost of living adjustment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN T. TUCKNESS,	)	
Plaintiff,	)	
v.	)	
	)	**Case No.**
UNITED STATES POSTAL SERVICE, POSTMASTER GENERAL, Marvin T. Runyon and RICHARD ASHCRAFT, President of Standard-Hart Printing Co.,Inc.	)	**98-4078-RDR**
Defendants.	)	

ORDER

IT IS ORDERED that Plaintiff's Motion to Amend Order for Scheduling Conference and Motion to Compel (doc. 30) is overruled.

Copies of this order shall be mailed to all counsel of record and unrepresented parties.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 25th day of August, 1998.

/s/ Ronald C. Newman
RONALD C. NEWMAN
U.S. Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN T. TUCKNESS, Plaintiff,	)	
v.	)	
	)	Case No.
MARVIN T. RUNYON, and RICHARD ASHCRAFT, Defendants.	)	98-4078-RDR

RICHARD ASHCRAFT'S REPLY BRIEF

On June 25, 1998, Richard Ashcraft filed his Motion to Dismiss and Memorandum Brief moving this Court for an Order pursuant to F.R.Civ.P. 12(b) dismissing this action for failure to state a claim upon relief can be granted. On August 20, 1998, the plaintiff filed his Motion to Deny, Overrule or Strike Ashcraft's Motion to Dismiss. The Court should consider this pleading submitted by the plaintiff to be his response to the defendant's Motion to Dismiss.

As best this defendant can tell, from reviewing the plaintiff's rambling Complaint and subsequent pleadings, Mr. Tuckness applied for a job with the postal service and was denied, in part

due to a reference received from Richard Ashcraft with whom Tuckness worked for about ninety days. Ashcraft's reference said that he found Tuckness to be disruptive and indicated that he would not recommend his reemployment. As a result, Tuckness has filed this action against the Postmaster General and Richard Ashcraft.

Richard Ashcraft's Motion to Dismiss sets forth eight facts, none of which are specifically controverted in the plaintiff's brief. However, a liberal reading of the plaintiff's brief would allow this Court to conclude that the plaintiff controverts fact number eight. Statement of fact number eight comes from Richard Ashcraft's Affidavit and states: "Two examples of plaintiff's disruptive nature are that he made threats about blowing people away and he brought dead animals which he described as "road kill" to the workplace." On page seventeen of the plaintiff's brief, the plaintiff states "the plaintiff will state here and now and will reiterate later that number eight (8) is a complete and total fabrication, it never happened!" **For the purposes of this reply, and for the purposes of the Court considering Ashcraft's Motion to Dismiss, Ashcraft will concede that fact number eight is controverted.**

Elsewhere in his brief,...

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply Brief was mailed first class, postage prepaid, on the 30th day of September, 1998, addressed to: Nancy Caplinger, Asst. US Attorney, Attorney for defendant Marvin T.. Runyon, Carlson Federal Courthouse, 444 SE Quincy, Topeka, Kansas, 66683, and John T. Tuckness, 1947 NW Lane, Topeka, Kansas, 66608-1683.

_____

Douglas S. Wright